KERAJAAN MALAYSIA & ORS

v.

NASHARUDDIN NASIR

FEDERAL COURT, KUALA LUMPUR
MOHAMED DZAIDDIN ABDULLAH CJ
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
[CRIMINAL APPEAL NO: 05-75-2002(B)]
9 AUGUST 2003

PREVENTIVE DETENTION: *Habeas corpus - Purpose - Whether to bring the body to court - Writ thereof - Whether to be addressed to person or authority having actual physical custody of person alleged to be detained illegally - Internal Security Act 1960 ss. 8, 8(1), 8B, 73(1) - Federal Constitution art. 5*

PREVENTIVE DETENTION: *Detention order - Preventive powers of Minister - Judicial review - Detention order under s. 8 Internal Security Act 1960 - Whether Minister had sole subjective discretion when issuing order - Review jurisdiction of court - Whether ousted by s. 8B - Whether s. 8B unconstitutional - Federal Constitution arts. 5, 149 - Internal Security Act 1960 ss. 8, 8(1), 8B*

STATUTORY INTERPRETATION: *Internal Security Act 1960 - Section 8B - Ouster clause - Preventive detention - Whether judicial review by court ousted - Whether to be read with art. 149 of Constitution - Whether unconstitutional*

On 17 April 2002 the respondent was detained by the police pursuant to s. 73(1) of the Internal Security Act 1960 ('ISA'). Thereupon the respondent filed a writ of *habeas corpus* challenging the validity of his detention. Before the writ was heard, however, a detention order under s. 8 of the ISA was issued against the respondent by the second appellant ('the Minister'). At the hearing of the writ before the High Court on 8 November 2002, the appellants raised a preliminary objection that the learned judge had no jurisdiction to hear the writ, as the motion pertaining to the s. 73 detention had been superseded by the ministerial detention order under s. 8, and that, under the circumstances, it was incumbent on the respondent to have filed a separate motion against his detention by the Minister. The learned judge nonetheless took the view that the s. 73 motion had been converted to one under s. 8 of the ISA, and on that basis overruled the objection, proceeded to hear the application and issued a writ of *habeas corpus* for the respondent's release. The appellants appealed

and before the learned appellate judges, questions *inter alia* arose as to: (i) whether the Minister, by defending the legality of his detention order, and filing an affidavit therefor, had submitted to the court's jurisdiction; and (ii) whether s. 8B of the ISA had ousted the review jurisdiction of the learned judge, and in any case whether the learned judge had failed to consider the operation and constitutionality of that section.

Held:
Per Steve Shim CJ (Sabah & Sarawak)

[1] The Minister had filed the affidavit consequent upon the decision of the learned judge in wanting to proceed to hear the complaint against the detention order issued under s. 8. Clearly there was a direction by the learned judge that the appellants had to file the relevant affidavits including one from the Minister. In the circumstances, given the stand taken by the appellants in the preliminary objection, it can reasonably be said that the Minister had little choice in filing the said affidavit. It cannot be said that the Minister had submitted to the court's jurisdiction without qualification. (p 89 b-c)

[2] The learned judge had proceeded to hear the s. 8 motion on the basis that art. 5 of the Constitution was stated in the recital. This is a misconception. It is trite law that the remedy of *habeas corpus* is intended to facilitate the release of persons actually detained in unlawful custody. That being so, the writ of habeas corpus had to be addressed to the person or authority having actual custody of the person alleged to be detained illegally. (pp 89 d-e & 90 b)

[2a] In a situation where the court finds it impossible to issue the writ because the person or authority no longer has custody of the detainee, the court should not hear the application. Indeed, it has no jurisdiction to do so. In the present case, when the application came up before the court, the police no longer had custody of the respondent as custody had been transferred to the Minister upon the issuance of a detention order under s. 8 of the ISA. In the circumstances, it would have been appropriate for the respondent to file a fresh notice of motion for a writ against the detention order issued by the Minister. In the absence of such a motion, the court had embarked on a misconceived course of action in assuming jurisdiction. (p 90 b-d)

[3] Section 8B has to be examined in the context of art 149(1) of the Constitution as well as s. 8(1) of the ISA. Read in that context, it is clear that s. 8B is intrinsically linked to s. 8 thereby creating a combined effect in combating subversive action(s) prejudicial to public order or national security. The section falls squarely within the parameters of art. 149(1) and is not hence unconstitutional. (pp 91 f-g & 92 b)

[4] Judicial review can be excluded by statutory legislation if the words used are unmistakably explicit. This is precisely the position taken by the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & Another Appeal* when construing the ouster clause in s. 59A of the Sabah Immigration (Amendment) Act 1997. Section 8B of the ISA is almost identical to the said s. 59A, and the words therein are explicit, clear and precise. The intention of Parliament is thus unmistakably obvious, ie. that the jurisdiction of the court is to be ousted in terms stated in s. 8B. Consequently, s. 8B is intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his discretionary power in accordance with the ISA, except as regards any question on compliance with any procedural requirement relating to the act or decision in question. (pp 93 g & 95 d-e)

[5] In *habeas corpus* proceedings, the question whether it is necessary that a person be detained under s. 8 of the ISA is a matter for the personal or subjective satisfaction of the executive authority, and the position is reinforced by s. 16 of the Act. In this case the Minister, having seen the police report, was satisfied, on a subjective basis, that the respondent's activities had threatened national security. It was therefore not open for the court to examine the sufficiency or relevance of the allegations contained in the report. These are important considerations which the learned judge ought to have taken into account. His failure to do so had an erroneous impact upon his conclusion that the detention order issued by the Minister under s. 8 of the ISA was tainted. That conclusion is clearly misconceived. (pp 98 b, h & 100 c-d)

[Appeal allowed]

***[Bahasa Malaysia** Translation of Headnotes*

Pada 17 April 2002 responden telah ditahan oleh polis di bawah s. 73(1) Akta Keselamatan Dalam Negeri 1960 ('AKDN'). Berikutnya, responden memfail writ *habeas corpus* bagi mencabar kesahan penahanannya. Bagaimanapun, sebelum writ didengar, satu perintah tahanan telah dikeluarkan terhadap responden

oleh perayu kedua ('Menteri'). Pada pendengaran writ di hadapan Mahkamah Tinggi pada 8 November 2002, perayu-perayu telah membangkitkan bantahan awal bahawa yang arif hakim tidak berbidang kuasa untuk mendengar writ oleh kerana usul berkaitan penahanan s. 73 telah diganti oleh perintah tahanan Menteri di bawah s. 8, dan bahawa, dalam halkeadaan sedemikian, responden adalah berkewajipan untuk memfail satu usul berasingan bagi mencabar perintah tahanan Menteri tersebut. Yang arif hakim bagaimanapun berpendapat bahawa usul di bawah s. 73 telah bertukar menjadi usul di bawah s. 8 AKDN, dan atas dasar itu telah menolak bantahan, meneruskan pendengaran permohonan dan mengeluarkan writ *habeas corpus* bagi pembebasan responden. Perayu-perayu merayu dan di hadapan yang arif hakim-hakim rayuan, persoalan antara lain telah berbangkit: (i) sama ada Menteri, dengan mempertahankan kesahan perintah tahanannya, dan memfail afidavit yang berkaitan itu, telah tunduk kepada bidang kuasa mahkamah; dan (ii) sama ada s. 8B AKDN telah menyisihkan bidang kuasa kajian semula yang arif hakim, dan walau apa pun, sama ada yang arif hakim telah gagal mempertimbang operasi serta keperlembagaan seksyen tersebut.

Diputuskan:
Oleh Steve Shim HB (Sabah & Sarawak)

[1] Menteri memfailkan afidavit ekoran keputusan yang arif hakim hendak meneruskan pendengaran bantahan terhadap perintah tahanan yang dibuat di bawah s. 8. Jelas terdapat arahan oleh yang arif hakim bahawa perayu hendaklah memfailkan afidavit-afidavit yang relevan termasuk satu afidavit oleh Menteri. Oleh yang demikian, mengambilkira pendirian perayu sewaktu bantahan awal, ianya boleh dikatakan bahawa Menteri tidak ada pilihan kecuali memfailkan afidavit. Maka itu, tidaklah boleh dikata bahawa Menteri telah tunduk kepada bidang kuasa mahkamah dengan tanpa syarat.

[2] Yang arif hakim bertindak mendengar usul s. 8 berdasarkan hakikat bahawa fasal 5 Perlembagaan telah tercatit dalam sebutan permulaan. Ini adalah satu salah tanggapan. Ianya menjadi undang-undang biasa bahawa remedi *habeas corpus* bertujuan untuk membantu membebaskan orang-orang yang ditahan di bawah kawalan yang tak sah. Oleh yang demikian, writ *habes corpus* hendaklah ditujukan kepada orang atau autoriti yang mempunyai kawalan sebenar akan orang yang dikatakan ditahan secara tak sah itu.

[2a] Dalam keadaan di mana mahkamah mendapati ianya mustahil untuk mengeluarkan writ kerana orang atau autoriti berkaitan tidak lagi

mempunyai kawalan ke atas orang yang ditahan, maka mahkamah tidak seharusnya mendengar permohonan. Ini kerana mahkamah tidak berbidang kuasa untuk berbuat demikian. Dalam kes semasa, sewaktu permohonan dibawa untuk didengar, pihak polis sudah tidak mempunyai kawalan terhadap responden, kerana kawalan sudah berpindah kepada Menteri ekoran pengeluaran perintah tahanan di bawah s. 8 AKDN. Dengan yang demikian, adalah wajar bagi responden untuk memfail satu notis usul yang baru memohon writ terhadap perintah tahanan yang dikeluarkan oleh Menteri. Dengan ketiadaan usul seperti itu, maka mahkamah telah memulai satu perjalanan yang salah kerana mengandaikan kewujudan bidang kuasa.

[3] Seksyen 8B harus ditafsir dalam konteks fasal 149(1) Perlembagaan serta s. 8(1) AKDN. Membacanya dalam konteks ini, ianya jelas bahawa s. 8B adalah bertaut rapat dengan s. 8 sekaligus membangkitkan kesan bersama bagi menentang kegiatan subversif yang membahayakan keamanan awam atau keselamatan negara. Seksyen ini terangkum kemas ke dalam parameter fasal 149(1) dan adalah berpelembagaan.

[4] Kajian semula kehakiman boleh disingkir oleh undang-undang statutori jika perkataannya terang dan jelas. Inilah pendirian yang diambil oleh Mahkamah Persekutuan dalam *Pihak Berkuasa Negeri Sabah lwn Sugumar Balakrishnan* bilamana mentafsir fasal menyingkir s. 59A Akta Imigresen Sabah (Pindaan) 1997. Seksyen 8b AKDN hampir menyamai s. 59A tersebut, dan perkataan-perkataan di dalamnya adalah tegas, terang dan jelas. Tujuan Parlimen dengan itu adalah jelas, iaitu bahawa bidang kuasa mahkamah hendaklah disingkir mengikut terma-terma yang ada pada s. 8B. Ianya mengikut bahawa s. 8B bertujuan untuk menyingkir kajian semula oleh mahkamah akan sebarang perbuatan yang dibuat oleh Menteri atau sebarang keputusan yang diambil oleh beliau dalam melaksanakan kuasa budi bicaranya mengikut AKDN, kecuali hal-hal yang menyentuh kepematuhan kepada keperluan prosedur oleh perbuatan atau keputusan berkenaan.

[5] Dalam prosiding *habeas corpus*, persoalan sama ada seseorang perlu ditahan di bawah s. 8 AKDN adalah perkara yang memerlukan kepuasan peribadi atau subjektif pihak berkuasa eksekutif dan kedudukan sebegini diperkuatkan oleh s. 16 Akta tersebut. Dalam kes semasa, Menteri, setelah meneliti laporan polis, telah berpuas hati, atas asas subjektif, bahawa kegiatan-kegiatan responden telah membahayakan keselamatan negara. Ianya dengan itu tidak terbuka bagi mahkamah untuk menyelidik kecukupan ataupun kerelevanan tuduhan-tuduhan yang ada dalam laporan

tersebut. Semua ini adalah pertimbangan penting yang harus diambilkira oleh yang arif hakim. Kegagalannya berbuat demikian menyebabkan beliau tersilap dalam rumusannya bahawa perintah tahanan oleh Menteri di bawah s. 8 adalah cacat. Keputusan itu jelas satu salah anggap.

Rayuan dibenarkan]

Case(s) referred to:

Barnardo v. Ford [1892] AC 326 ***(refd)***

Council of Service Unions & Ors v. Minister for Civil Service [1985] 1 AC 374 ***(refd)***

Enesty Sdn Bhd v. Transport Workers Union & Anor [1986] 1 MLJ 18 SC ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 ***(foll)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(foll)***

Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Mohamed Ezam Mohd Noor v. Ketua Polis Negara & Ors Appeals [2002] 4 CLJ 309 FC ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Anor Appeal [2002]4 CLJ 105 FC ***(foll)***

R v. Lord Chancellor ex p Witham [1997] 2 All ER 779 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***

Re Onkar Shrian [1970] 1 MLJ 28 ***(refd)***

Re Tan Sri Raja Khalid Raja Harun [1988] 1 MLJ 182 ***(refd)***

Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor And Another Appeal [1998] 3 CLJ 85 CA ***(foll)***

Tanjong Jaga Sdn Bhd v. Minister of Labour & Manpower & Anor [1987] 2 CLJ 119; [1987] CLJ (Rep) 368 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78

Federal Constitution, art. 5(3), 9, 10, 13, 149(1)

Industrial Relations Act 1967, ss. 9(6), 29(3)(a)

Internal Security Act 1960, ss. 8(1), 8B, 16, 73(1), (3), Chapter II of Part II

Sabah Immigration (Amendment) Act 1997, s. 59A

Other source(s) referred to:

Short & Mellor's Practice on the Crown Side, 2nd edn, p 309

For the appellants - Mohd Yusof Zainal Abiden (Tun Abdul Majid Tun Hamzah, Kamaludin Md Said & Nordin Hassan DPP)

For the respondent - Sulaiman Abdullah (Sivarasa Rasiah, Ranjit Singh, Edmund Bon & Ho Kok Yew); M/s Saiful Kasri

Reported by WA Sharif

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

The Issues

On 8 November 2002, the Shah Alam High Court issued a writ of *habeas corpus* against the respondent ordering his release from a s. 8 ministerial detention order. Dissatisfied, the appellants have appealed against that order. The notice of appeal filed on 9 November 2002 is signed by the attorney-general. The petition of appeal is dated 23 December 2002. Although the appellants, in their petition, have propagated 9 grounds, they have decided, not without some relief on our part, to proceed only on one ground. Still, it covers a wide berth and it states:

> That the learned judge had erred in law when he had misdirected himself in deciding that the Minister's order of detention under section 8(1) as unlawful after having concluded that the detention by the police under section 73(1) was unlawful.

Possibly because of its generality counsel for the appellants has advanced a number of what he calls reasons in support which are in reality more in the nature of propositions and they can, I think, be effectively compressed into two. They are:

(1) that the learned judge had no jurisdiction to hear the complaint against the detention order issued by the Minister under s. 8 of the Internal Security Act 1960 (hereinafter referred to as "the ISA"):

   (a) given the nature of the motion before him; and

   (b) in view of the ouster clause in s. 8B of the ISA.

(2) that the learned judge was wrong in holding that the legality or otherwise of a s. 8 detention hinges on the detention under s. 73 of the ISA.

The Factual Background

The factual background relevant to these considerations can be briefly stated herein. The respondent, a fishmonger from Hulu Langat, Selangor, was arrested by the police in the wee hours of the morning on 17 April 2002, pursuant to s. 73(1) of the ISA. On 15 May 2002, the respondent, through his lawyers, filed a notice of motion seeking, *inter alia*, an order that access to his lawyers be given pursuant to art. 5(3) of the Federal Constitution (hereinafter referred

to as "the Constitution") and further or in the alternative, that he be released. On 11 June 2002, the High Court heard the application in respect of access to lawyers and granted an order in terms thereof. The High Court ordered that the lawyers be allowed to meet with the respondent at 2.30pm on 12 June 2002. That part of the application relating to habeas corpus was postponed to a later date. On 12 June 2002, the Minister issued a detention order under s. 8 against the respondent. On 8 November 2002, the *habeas corpus* application was heard. The High Court allowed it and ordered the release of the respondent. As I said before, it is against that order that the appellants have now appealed.

Nature Of The Motion Before The Court

It is, I think, essential to determine the thrust of the motion filed by the respondent. It is clear that at the material time when the motion was filed, the respondent was detained by the police under s. 73 and the motion was directed at the police on the basis of that detention. It was only subsequently that the respondent was detained by the Minister under s. 8 of the ISA. Not surprisingly, counsel for the appellants took umbrage; contending that it was quite improper to have cited the Minister in the said motion. Counsel took the view that the respondent ought to have filed a separate motion against his detention by the Minister. The point was raised by him in his preliminary objection before the learned judge but it was summarily rejected. The learned judge apparently held that the motion was sufficiently wide enough to cover a s. 8 detention order and as such, he had jurisdiction to deal with it. Indeed, counsel for the respondent has gone further by stating that the parties had proceeded on the basis that the s. 73 motion had been converted to one under s. 8. This is reflected on p. 4 in para. 5.4 of his outline submission which reads:

> On 14 June 2002, Encik Kamaluddin Mohd Said, who appeared for the Appellants, informed counsel for the Respondent and the Court that the Minister has issued a detention order pursuant to section 8 of the ISA on 12.6.2002 effective from 13.6.2002. After some discussion with the learned Judge on how to approach the matter, the learned Judge directed that the application proceed as a section 8 *habeas corpus* application instead of the need to file a fresh *habeas corpus* application. Both the Appellant and the Respondent and the learned Judge, during the course of the discussion proceeded on the basis that the Respondent was entitled to convert the section 73 *habeas corpus* application to a section 8 *habeas corpus* application. Parties therefore proceeded on that basis. The learned Judge then fixed 16.7.2002 as a mention date for parties to file further affidavits.

It is not at all clear from the judgment of the learned judge that there was an agreement to convert as alleged by counsel for the respondent. If there was, why then should counsel for the appellants continue to latch on to his preliminary objection on a subsequent date? (See para. 5.8 outline submission

of counsel for the respondent). Such conduct clearly militated against the alleged agreement to convert. In any event, had there been one, the learned judge would have expressly said so in his judgment. As I said, he did not.

Counsel then raised the point that the Minister had subjected himself to the jurisdiction of the court when he defended the legality of his detention order by filing the relevant affidavit. Here, it has to be noted that the Minister had filed his affidavit consequent upon the decision of the learned judge in wanting to proceed to hear the complaint against the detention order issued under s. 8. Clearly, there was a direction from the learned judge that the appellants had to file the relevant affidavits including one from the Minister. In the circumstances, given the stand taken by counsel for the appellants in his preliminary objection at the material time, it can reasonably be said that the Minister had little choice in filing the said affidavit. That being the position, it cannot be said that the Minister had submitted to the court's jurisdiction without qualification.

Now, counsel for the respondent has submitted that the course of action taken by the learned judge was perfectly in order. There is some indication that the learned judge proceeded to hear the s. 8 motion on the basis that art. 5 of the Constitution was stated in the recital. This is implicit on perusal of the notes of proceedings on pp. 630 and 631 of the appeal record. In my view, this is a misconception. It is trite law that the remedy of *habeas corpus* is intended to facilitate the release of persons actually detained in unlawful custody. It is the fact of detention which gives the court its jurisdiction (see *Barnardo v. Ford* [1892] AC 326). The observation made by Choor Singh J in *Re Onkar Shrian* [1970] 1 MLJ 28 is particularly instructive. He said:

> Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by *habeas corpus*. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus.*

The learned judge also quoted with approval the following passage in *Short & Mellor's Practice on the Crown Side*, 2nd edn at p. 309:

> The primary object of the writ is for the purpose of bringing the body into court, and therefore, if that is impossible, the writ ought not to issue. It should not be used punitively but only remedially. In *R v. Barnado* [1892] AC 316, Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the

authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. In this the rest of the court agreed.

In the result, Choor Singh J took the position that a writ of *habeas corpus* had to be addressed to the person or authority having actual physical custody of the person alleged to be detained illegally. That, in my view, represents a correct statement of the law. In a situation where the court finds it impossible to issue the writ because the person or authority no longer has custody of the detainee, it should not hear the application. Indeed, it has no jurisdiction to do so. This is precisely the position in the instant case. Here, the facts show that when the application came up for full argument before the court, the police no longer had custody of the respondent. Custody had been transferred to the Minister upon the issuance of a detention order under s. 8 of the ISA. In the circumstances, it would have been appropriate for the respondent to file a fresh notice of motion for a writ against the detention order issued by the Minister. In the absence of such a motion, the court had embarked on a misconceived course of action in assuming jurisdiction.

The Ouster Clause In s. 8B Of The Internal Security Act 1960

I come next to the proposition raised by counsel for the appellants that the learned judge had failed to consider the operation of s. 8B of the ISA which states:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

In countering this proposition, counsel for the respondent has raised two broad fronts. First, he makes the point that the ISA is a special law. It is a creature of art. 149 of the Constitution which provides that any provision in any Act of Parliament whose recital satisfies art. 149(1) is valid notwithstanding that the provision may be inconsistent with arts. 5, 9, 10 or 13 of the Constitution. Article 149(1) reads:

> 149. Legislation against subversion, action prejudicial to public order, etc
>
> (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

It is counsel's contention that art. 149, read strictly, only empowers Parliament to pass laws designed to stop or prevent the various purposes, enumerated therein but that s. 8B of the ISA is not designed for any of the purposes stated and therefore unconstitutional.

There is no doubt that the ISA is a special piece of legislation that has its provenance in art. 149 of the Constitution although upon restrictive terms ie, that only provisions which are designed to stop or prevent the enumerated actions or purposes are allowed to be inconsistent with arts. 5, 9, 10 or 13. The question for consideration is whether s. 8B is such a provision. Quite clearly, the words "designed to stop or prevent that action" in art. 149(1) are particularly significant. In my view, s. 8B has to be examined in the context of art. 149(1) as well as s. 8(1) of the ISA which reads:

Power to order detention or restriction of persons

(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

Under s. 8, the Minister has been conferred powers of preventive detention. The powers can be said to be draconian in nature. They are obviously designed to stop or prevent subversive actions or actions prejudicial to public order or

national security (see *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182). And s. 8B, being an ouster clause, has the effect of immunising (as I shall elaborate later) the powers of the Minister from judicial review. As such it plays an integral part within the whole scheme relating to the Minister's preventive powers and decisions made thereunder. In this sense, s. 8B is intrinsically linked to s. 8 thereby creating a combined effect in combating subversive actions or actions prejudicial to public order or national security. It falls squarely within the parameters of art. 149(1) aforesaid. In the circumstances, s. 8B is not an unconstitutional provision. On that score, I must disagree with counsel for the respondent.

Given the validity and constitutionality of s. 8B, the next question for consideration is whether it can succeed in ousting the review jurisdiction of the court. In *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, the Federal Court held as follows:

> It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent power but, I would hasten to add, its extent may be determined not merely by judicial development but also by legislative intervention.

So quite clearly, Parliament may legislate on the extent and scope of judicial review in particular situations. Indeed, Edgar Joseph Jr FCJ had a further occasion to deal with the effect of an ouster clause on the jurisdiction of the court. This was in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 (or the *MPPP* case) concerning s. 29(3)(a) of the Industrial Relations Act 1967. Therein, he cited with approval the Supreme Court case of *Enesty Sdn Bhd v. Transport Workers Union & Anor* [1986] 1 MLJ 18, in particular the observation of Mohamed Azmi SCJ who said:

Since then, (the decision in *Fire Bricks*) legal opinion in England, particularly that of the House of Lords has not stood still. The suggestion of Lord Denning (in *Pearlman*) to discard the distinction between error of law which affects jurisdiction and one which does not and thereby widening the scope of *certiorari* notwithstanding the existence of an ouster clause has gained momentum. Lord Denning also referred to *In re Racal Communications Ltd* [1980] 2 All ER 364 and *O'Reilly v. Mackman & Ors and Other Cases* [1982] 3 All ER 1124.

From the passage above, nothing can be implied to exclude completely the effect of an ouster clause. Indeed, the position taken by Edgar Joseph Jr FCJ became clear in the later part of his judgment when he said this:

> We might as well add that it was Lord Diplock's view, expressed in *Re Racal* and in *O'Reilly* that it is a constitutional principle of the highest order that it is the High Court that determines the meaning of legislation and not any other entity, that Parliament must be unmistakably explicit if it is to give any such power to any other entity and this had been so decided by Anisminic ...
>
> It *(Re Racal)* was held by the majority that the ouster clause – s. 441(3) of the Companies Act 1948: 'The decision of the judge of the High Court ... on an application under this section shall not be appealable' – was effective to exclude the power of the Court of Appeal to review the High Court judge's decision.

It is interesting to note that in the recent case of *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor (and Another Appeal)* [1998] 3 CLJ 85, the Court of Appeal, presided by Gopal Sri Ram JCA, cited with approval the observation of Laws J in *R v. Lord Chancellor, ex parte Witham* [1997] 2 All ER 779. I draw attention to that part of the observation which states:

> It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. A statute may give the permission expressly; in that case, it would provide in terms that in defined circumstances the citizen may not enter the court door.

From the authorities cited, it seems clear that judicial review, which is essentially a creature of the common law, can be excluded by statutory legislation if the words used are unmistakably explicit. And this is precisely the position taken by the Federal Court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan (and Another Appeal)* [2002] 4 CLJ 105 in construing the ouster clause in s. 59A of the Sabah Immigration (Amendment) Act 1997 (Act A985) under the heading: "Exclusion of judicial review". Section 59A reads:

> (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.

(2) In this section, 'judicial review' includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of mandamus, prohibition and *certiorari*;

(b) an application for a declaration or an injunction;

(c) any writ of *habeas corpus*; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director-General or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

The Federal Court held that the court's jurisdiction to review was ousted by s. 59A on the cardinal principle that where the intention of Parliament was clearly expressed, the duty of the court was to give expression to that intention. Therein Tun Dzaiddin who delivered the judgment said, *inter alia*:

> The wider issue is whether statutory provisions of the type stipulated in s. 59A can preclude the court from examining its powers of judicial review over the decision of public decision makers ...
>
> Secondly, in our view, s. 59A is more elaborately expressed and more exclusionary in its scope. Whereas the repealed section provides that an order of the Minister, the director general or the state authority under the Act or any subsidiary legislation shall without prejudice to any provisions giving right to appeal to the Minister in respect of the order of the director general, be final and shall not be called in question in any court on any ground whatsoever, the language in the present s. 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the Minister, director general or the state authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in paragraph (2) of s. 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the Minister or the decision-maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.

At this point, it may be appropriate to note that the pre-amended s. 59A of the Sabah Immigration Act referred to in *Sugumar Balakrishnan* was very much similar in terms to s. 9(6) of the Industrial Relations Act 1967 which came up for consideration by the Supreme Court in *Tanjong Jaga Sdn Bhd v. Minister of Labour & Manpower & Anor* [1987] 2 CLJ 119; [1987] CLJ (Rep) 368. Therein, Abdoolcader FCJ observed that s. 9(6) which postulated a

privative clause was ineffective as regards jurisdictional error. (See also *Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471).

Given the established authorities referred to, it cannot be said that the Federal Court in *Sugumar Balakrishnan* has broken any new ground in determining the extent and scope of ouster clauses. There is no paradigm shift. It has followed entrenched principles which can effectively be summed up as follows: that an ouster clause may be effective in ousting the court's review jurisdiction if that is the clear effect that Parliament intended; that if the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention. Clearly, the intention of Parliament is to be garnered from the wordings of the ouster clause.

Now, s. 8B of the ISA is almost identical to s. 59A of the Sabah Immigration Act. In my view, the words in s. 8B are explicit. They are clear and precise. They are exclusionary in nature and effect. The intention of Parliament is unmistakably obvious ie, that the jurisdiction of the court is to be ousted in terms stated in s. 8B. In the premises, adopting the test taken by the Federal Court in *Sugumar Balakrishnan*, the court must give expression to Parliament's intention. Section 8B is therefore intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his discretionary power in accordance with the ISA except as regards any question on compliance with any procedural requirement relating to the act or decision in question.

Given the proper interpretation to be placed on s. 8B what is the position in the instant case? Here, there is evidence that the impugned order was issued by the relevant Minister. There is also evidence that he had issued it in the exercise of his discretionary power under or in accordance with s. 8(1) of the ISA. Furthermore, evidence shows that all the necessary procedural requirements had been complied with by the Minister in issuing the detention order. Indeed, the respondent made no complaint on this score.

Matters Of National Security

Now, matters of national security have always been considered by the courts to have a peculiar texture. They have called for special treatment. In such matters, Ong Hock Thye CJM in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 appears to adopt the more realistic approach taken by the English authorities. In dealing with the ISA in the context of art. 149 of the Constitution, he said this:

> Under article 149 any provision in the Internal Security Act designed against action prejudicial to national security is declared 'valid notwithstanding that

> it is inconsistent with any of the provisions of article 5, 9 or 10', namely, the fundamental liberties. This, of course, means sanction of encroachments on the rule of law, justified in the national interest. Under the circumstances, I think it must be frankly acknowledged that a perfect decision is in most cases an unattainable ideal. Once this fact, is appreciated it seems to me that the issues raised in this appeal require a realistic approach rather than as an exercise in semantics ...
>
> Perusing both English and Indian authorities has been no small task, but at the end of it all, I would sum up by saying that, in my humble opinion, English courts take a more realistic view of things, while Indian judges, for whom I have the highest respect, impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers.

I think it is fair to say that his lordship's preference for English authorities over Indian ones could be confined to the context of the issues before him. These of course relate essentially to detention orders issued by the Minister under the ISA. In matters of preventive detention relating to national security, the judges are the executive. That proposition was firmly laid down by Lord Fraser in *Council of Service Unions & Ors v. Minister for Civil Service* [1985] 1 AC 374 (or the *CCSU* case) wherein he said:

> Those who are responsible for the national security must be the sole judge of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

This might well have moulded the perception of the Federal Court in *R Rama Chandran, supra,* wherein Edgar Joseph JR FCJ said that where policy considerations were involved in administrative decisions and courts did not possess knowledge of the policy considerations which underlay such decisions, courts ought not to review them. His lordship reiterated the same stand in the *MPPP* case. In *Sugumar Balakrishnan,* Gopal Sri Ram, in the Court of Appeal, I think, made a pertinent observation. After a lengthy discussion on the various aspects of judicial review, he said this:

> Nothing we have said thus far is to be taken as affecting cases that involve either national security or national interest. It is obvious that special consideration must be given to those cases as a matter of judicial policy ... because the subject-matter in respect of which judicial review is sought is one that is best left to the executive arm of the government to deal with according to the exigencies of the particular case and based upon information that is exclusively available to it.

It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like.

If however, the court found itself compelled to intervene, as it had done in the instant case, notwithstanding the ouster clause in s. 8B or the cautionary advice I mentioned a moment ago, it must necessarily resolve the important question of whether the objective or the subjective test applies to the exercise of the Minister's discretion under s. 8(1) pf the ISA. In Malaysia, that question has been answered by the Federal Court in *Karam Singh, supra,* consisting of a strong panel of eminent judges including Ong Hock Thye CJM and Suffian FCJ (as he then was). Suffian FCJ who wrote the main judgment said, *inter alia*:

> ... When the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation ...
>
> Our law is quite different from that of India. First, as already stated, the power of detention is here given to the highest authority in the land, acting on the advice of the Ministers responsible to and accountable in Parliament, not to mere officials. Secondly, as already stated, here detention, in order to be lawful, must be in accordance with law, not as in India when it must be in accordance with procedure established by law ...
>
> Finally, in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him.
>
> The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

And Gill FCJ echoed the same sentiments when he said:

> There is ample authority for the proposition that it is not the function of the court to act as a court of appeal from the discretionary decision of the Cabinet and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold the appellant in detention.

Finally, Ali FCJ, another member of the distinguished panel quite appropriately, summed up the thrust of the court's view. He said:

> ... that in *habeas corpus* proceedings such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under s. 8(1)(a) of the Internal Security Act 1960 is a matter for the personal or subjective satisfaction of the executive authority.

In my view, the pronouncements made by their lordships in *Karam Singh* apply with equal force to the provisions of s. 8 of the current ISA. Clearly therefore, in determining whether or not to issue the detention order under the said section, a subjective judgment is accorded to the Minister. The position is reinforced by s. 16 of the ISA which stipulates:

> Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.

The "Chapter" cited above refers to Chapter II of Part II of the ISA which covers the Minister's powers of preventive detention under s. 8. Under the said section, the Minister is entitled not to disclose facts or produce documents if he considers it to be against national interest. Such non-disclosure must have the added effect of making the test under s. 8 a subjective one.

It is in the light of the principles enunciated in *Karam Singh* that the present case ought to be examined. Here, there is evidence that the Minister had, when issuing the detention order, relied on the police report. This is reflected in his affidavit. Counsel for the respondent in para. 32.3 of his outline submission stated that the Minister had relied wholly on this report and that he was satisfied that the activities of the respondent would pose a threat to the security of the nation. From this, it is immediately clear that the said report related to matters of national security which involved the respondent. The Minister was satisfied that the activities of the respondent threatened national security. That satisfaction was a subjective one. From that perspective, there would be no violation of the principles established in *Karam Singh.*

In my view, these are important considerations which the learned judge ought to have taken into account. His failure to do so had an erroneous impact upon his conclusion that the detention order issued by the Minister under s. 8 of the ISA was tainted. That conclusion is clearly misconceived.

Whether Legality Or Otherwise Of A s. 8 Detention Hinges On A s. 73 Detention

The final proposition advanced by counsel for the appellants relates to the alleged misdirection by the learned judge in holding that the legality or illegality (as the case may be) of a s. 8 detention hinges on the detention under s. 73 of the ISA. Here, counsel has submitted that any illegality or irregularity in the detention order under s. 73 is quite irrelevant in determining the legality of a s. 8 detention order. He contends that as the detention order under s. 73 has been superceded by the order of the Minister under s. 8, the court should not have proceeded to hear the motion which was based on the complaint against the police. According to him, a separate motion for writ of *habeas corpus* ought to have been made by the respondent, citing in support the observation of Steve Shim CJ (Sabah & Sarawak) in *Mohamed Ezam bin Mohd Noor v. Ketua Polis Negara (and 4 Other Appeals)* [2002] 4 CLJ 309 which reads:

> However, as the undisputed facts show that the appellants ... have now been detained by order of the Minister under s. 8 of the Act, the issue of whether or not to grant the writ of *habeas corpus* for their release from current detention does not concern us. That is a matter of different exercise.

Quite clearly, the submissions are aimed essentially at the concluding part of the judgment of the learned judge when he said as follows:

> With some not too careful officer having blemished the substantive procedural aspect of the detention exercise, it goes without saying that the eventual order issued by the Minister, must similarly be tainted (*Nik Adli bin Nik Abdul Aziz v. Ketua Polis Negara* [2002] 1 CLJ 161) If the roots are bad surely the fruits too will be bad. Some say that if the roots are bad, there will be no trees let alone fruits.

In countering the submissions, counsel for the respondent contends that the Minister had in fact based his s. 8 detention order solely on the basis of the report made by the police pursuant to s. 73(3) and was correct in holding that the said s. 8 detention order was tainted by the impropriety of the s. 73 detention. According to him, since the report was the result of the s. 73 detention which was bad, (indicating "the root"), therefore the s. 8 detention order must necessarily be bad (indicating "the fruit"). (See paras. 32.3 and 32.4 of his outline submission).

I must confess I am unable to comprehend the rationale behind the learned judge's statement that "if the roots are bad, surely the fruits too will be bad." If it is meant to be an a axiomatic proposition for all purposes, then it cannot possibly be true because one can envisage many situations which do not necessarily fall into such a dogmatic characterization especially where human

conduct and behaviour is concerned. Quite conceivably, as counsel for the respondent has submitted, the expression is meant to support the proposition that the illegality of the s. 73 detention order had adversely affected the detention order issued by the Minister under s. 8 or conversely, that the s. 8 detention order was tainted as a result of the illegality or irregularity of the s. 73 detention order. If that be the case, then it would appear that the learned judge had failed to examine the factual circumstances in the context of the principles enunciated by the Federal Court in *Karam Singh*. It is not disputed that there is affidavit evidence that the Minister, on the basis of the report submitted to him, was satisfied that the activities of the respondent were a threat to the security of the country. Whether or not the allegations in the said report on which the s. 8 detention order was based, were sufficient or relevant, was a matter to be decided solely by the Minister. In this case, he was satisfied, on a subjective basis, that the respondent's activities had threatened national security. It was therefore not open to the court to examine the sufficiency or relevance of the allegations contained in the report. None of these considerations appear in the judgment of the learned judge.

Conclusion

In the circumstances and for the reasons stated, I find sufficient merits in the appeal. Accordingly, the appeal is allowed. My learned sister Siti Norma Yaakob FCJ has seen this judgment in draft and has expressed agreement with it. As Mohamed Dzaiddin Abdullah CJ has now retired, this judgment is given pursuant to s. 78 of the Courts of Judicature Act 1964.